UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Selina Valencia, individually and on behalf of all others similarly situated,	:	
Plaintiff,	:	7:23-cv-01399-CS
-v.-	:	Hon. Cathy Seibel
Snapple Beverage Corp.,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS CLASS ACTION COMPLAINT

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I. INTRODUCTION

Plaintiff Selina Valencia posits theories of deception about the labeling of Defendant Snapple Beverage Corp.'s fruit juice drinks that her own Amended Complaint affirmatively discredit; that are contradicted by common sense, and that other courts have rejected. Plaintiff insists that the "All Natural" claim on certain Snapple fruit juice drinks is misleading because of two ingredients in the products: (1) citric acid; and (2) fruit and vegetable juice, used for coloring. Neither theory has any basis in fact or law.

As to citric acid, the core problem is that—as the Amended Complaint (correctly) acknowledges—this is a food ingredient that can be produced naturally. Indeed, the FDA definition for "citric acid" specifically recognizes its status as an ingredient that can be sourced "naturally." The Amended Complaint thus does not affirmatively allege that the citric acid used in Snapple fruit juice drinks is non-natural. Instead, it merely points out that there are also forms of solvent-extracted citric acid available. But alluding to a possibility of a non-natural ingredient is not a plausible allegation that *Snapple's* fruit juice drinks contain that variety of the ingredient. Courts have dismissed other similar complaints on this same basis, correctly holding that the *potential* for artificially-derived citric acid in foods is not the same thing as an allegation that the defendant's product contains that form of the ingredient. The same reasoning applies here.

The theory of deception is even more outrageous as to the second challenged ingredient, fruit and vegetable juice. Plaintiff's assertion here requires a double-take: She contends that fruit and vegetable juice—an ingredient she acknowledges comes from entirely natural sources—should not be in foods labeled "All Natural." The long string of "reasonable consumer" case law that obligates the Court to apply common sense when evaluating a plaintiff's claimed deception is all that is needed to dispose of this claim. In an effort to give these allegations a sheen of

plausibility, Plaintiff points to decades-old informal guidance from the FDA, never adopted into law, suggesting that the agency does not believe foods labeled "natural" should use coloring agents regardless of source. But a consistent body of case law holds that the FDA's opinions on a subject are not deemed those of any "reasonable consumer." That is especially true where, as here, the FDA's viewpoint is one expressed in an informal statement that carries no force of law.

For these reasons, the Amended Complaint should be dismissed with prejudice.

II. FACTUAL BACKGROUND

Snapple manufactures and distributes a variety of fruit-based juice drinks under the familiar Snapple brand ("Snapple Juice Drinks"). Am. Compl. ¶¶ 1-2. Some Snapple Juice Drinks bear the statement "All Natural," because these products' ingredients come directly from nature or are naturally sourced. *Id*. The specific Snapple Juice Drinks at issue here, Mango Madness and Snapple Apple (Am. Compl ¶ 2) contain ingredients in conformity with this "All Natural" language: apple and pear concentrate, mango puree, kiwi juice, and natural flavors. *Id.*¶ 22.

The Amended Complaint nonetheless alleges that the "All Natural" claim is misleading because of the presence of two ingredients: (1) citric acid, and (2) vegetable and fruit juice, used as coloring in certain Snapple Juice Drinks. *Id.* ¶¶ 22-29. As to both challenged ingredients, however, the Amended Complaint admits to their naturalness.

First, for citric acid, the Amended Complaint correctly admits this is an ingredient that can be obtained from natural sources. *Id*. ¶ 25 (citric acid can be obtained from "citrus fruit" and can be "natural"). The FDA regulation defining "citric acid" as a food ingredient likewise acknowledges this inarguable fact, which is that citric acid is a natural substance capable of being manufactured using natural sources. *See* 21 C.F.R. § 184.1033(a) ("Citric acid….*is a naturally occurring constituent* of plant and animal tissues…Citric acid may be *produced by recovery from*

sources such as lemon or pineapple juice.") (emphasis added). There are, as the FDA definition recognizes, also alternative methods of production of citric acid, including via solvent extraction. *Id*. But as the face of the regulation makes plain, solvent extraction—versus manufacture with natural sources—is only one of several alternative methods used to obtain citric acid. *Id*. The Complaint points to this alternative method of manufacture through the use of solvents, Am. Compl. ¶¶ 26-28, but does not contain a single allegation of fact to indicate that the citric acid in Snapple Juice Drinks is produced via this method.

So, on its face the Amended Complaint acknowledges (consistent with FDA definitions) the potential for naturally-sourced citric acid. And yet, the Amended Complaint fails to affirmatively allege that the citric acid in Snapple Juice Drinks is not the naturally-sourced variety. In its Pre-Motion Conference Letter to the Court, Snapple pointed out this specific pleading failure—the lack of any allegation that the form of citric acid used in Snapple Juice Drinks is the non-natural variety. *See* Dkt. No. 8 ("Snapple Pre-Motion Letter") (Jun. 30, 2023) ("The Complaint does not, however, allege that the variety of citric acid used in Snapple Apple Juice is artificial. Indeed, the Complaint acknowledges that certain forms of citric acid are naturally occurring."). The Plaintiff nonetheless filed an Amended Complaint that remained devoid of any assertion that the specific form of citric acid used in Snapple Juice Drinks is non-natural, and continued to admit to the availability of natural citric acid. Am. Compl. ¶¶ 25-29.

Second, the Amended Complaint challenges the presence of fruit and vegetable juice as inconsistent with the "All Natural" claim because it is used for coloring purposes. *Id*. ¶ 23. Here, the Amended Complaint also admits, as it must, that fruit and vegetable juice are indisputably natural. Am. Compl. ¶ 24 ("the coloring in the apple and mango drinks are from natural sources"). And the Snapple Fruit Drinks' labels plainly state that the vegetable and fruit juice concentrate is

used for coloring when that is their function in the product. *Id.* ¶ 22 (depicting Snapple Juice Drinks' label stating "Vegetable and Fruit Juice Concentrates (For Color)").

In an attempt to substantiate the logic-bending assertion that natural fruit and vegetable juice is not natural, the Amended Complaint points a thirty-year old non-binding statement in FDA guidance purporting to suggest that food labeled "natural" should not contain any added coloring "regardless of source." Am. Compl. ¶ 14 n. 4; *see also* Food & Drug Admin., *Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definitions*, 56 Fed. Reg. 60421, 60466 (Nov. 27, 1991) (same). There is no allegation of fact that consumers share the FDA's decades-old informal view.

Based on these allegations, the Amended Complaint pleads two causes of action: (1) violation of New York GBL §§ 349 and 350; and (2) unjust enrichment. Plaintiff seeks certification of a New York only class, although does not request any injunctive relief.

The narrowness of the Amended Complaint is owed to, in part, Plaintiff withdrawing several claims and allegations as part of the Court's Pre-Motion Letter requirement process. *Compare* Dkt. No. 1 (initial Complaint) *with* Am. Compl. Plaintiff's counsel represented to the Court during that process that the allegations as reflected in the Amended Complaint could not be further substantiated or supported with additional facts—that this was Plaintiff's best version of her case. *See* Minute Entry (Jul. 28, 2023) (noting that Plaintiff declined opportunity for further amendment of her pleading).

III. ARGUMENT

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), it is a plaintiff's burden to demonstrate that she has stated a claim for relief, and that obligation "requires more than labels and

conclusions" or a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether a complaint satisfies this burden, the court "begin[s] by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and then determines whether the remaining well-pleaded factual allegations, accepted as true, "plausibly give rise to an entitlement to relief." *Bautista v. CytoSport, Inc.*, 223 F. Supp. 3d 182, 187–88 (S.D.N.Y. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 188 (quoting *Iqbal*, 556 U.S. at 679). "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* (cleaned up) (quoting *Iqbal*, 556 U.S. at 679).

B. Plaintiff's GBL Claims Fail Under the Reasonable Consumer Standard

To state a claim for false advertising under GBL sections 349 and 350, a plaintiff must plausibly allege "(1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) (citations omitted). The second element requires that the defendant's conduct be "likely to mislead a consumer acting reasonably under the circumstances." *Kommer v. Bayer Consumer Health*, 252 F. Supp. 3d 304, 310–11 (S.D.N.Y. 2017) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y. 2d 20, 26 (1995)), *aff'd sub nom.*, 710 F. App'x 43 (2d Cir. 2018). Under this standard, courts ask "whether a reasonable consumer, not the least sophisticated consumer, would be misled by Defendants' actions." *Weinstein v. eBay, Inc.*, 819 F. Supp. 2d 219, 228 (S.D.N.Y. 2011).

"[C]ourts regularly determine, as a matter of law, that a defendant's conduct would not have misled a reasonable consumer. This determination may happen at the motion to dismiss stage, before any discovery is conducted." *Rodriguez v. The Cheesecake Factory, Inc.*, 2017 WL 6541439, at *5 (E.D.N.Y. Aug. 11, 2017) (dismissing GBL claims under the reasonable consumer standard); *see also Twohig v. Shop-Rite Supermarkets, Inc.*, 519 F. Supp. 3d 154, 160 (S.D.N.Y. 2021) (same); *Baretto v. Westbrae Natural, Inc.*, 518 F. Supp. 3d 795, 802 (S.D.N.Y. 2021) (same); *Kommer v. Bayer Consumer Health*, 252 F. Supp. 3d 304, 311 (S.D.N.Y. 2017) (same); *Weinstein v. eBay, Inc.*, 819 F. Supp. 2d 219, 228 (S.D.N.Y. 2011) (same). And the Second Circuit routinely affirms such dismissals. *See, e.g.*, *George v. Starbucks Corp.*, 857 F. App'x 705, 706 (2d Cir. 2021); *Axon v. Florida's Natural Growers, Inc.*, 813 F. App'x 701, 703 (2d Cir. 2020); *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019); *Excevarria v. Dr Pepper Snapple Grp., Inc.*, 764 F. App'x 108 (2d Cir. 2019); *Manual v. Pepsi-Cola Co.*, 763 F. App'x 108 (2d Cir. 2019); *Fink v. Time Warner Cable*, 714 F.3d 739, 740 (2d Cir. 2013) ("It is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer.").

Plaintiff's counsel is certainly well-familiar with these standards, as scores of food labeling cases filed by the same attorney over the past several years have been subject to Rule 12 dismissal for failure to satisfy the "reasonable consumer" standard, prompting courts in this district and elsewhere to question whether sanctions for such "frivolous" filings are appropriate. *See Hoffman v. Kraft Heinz Foods Co.*, 2023 WL 1824795, at *6-7 (S.D.N.Y. Feb. 7, 2023); *Brownell v. Starbucks Coffee Co.*, — F.Supp.3d —, 2023 WL 4489494, at *8 (N.D.N.Y. Jul. 12, 2023). Indeed, in this Court alone Plaintiff's counsel has had multiple complaints fail to survive Rule 12. *See Dwyer v. Allbirds, Inc.*, 598 F.Supp.3d 137 (S.D.N.Y.2022); *Beers v. Mars Wrigley, LLC*,

2022 WL 4393555 (S.D.N.Y. Feb. 17, 2022); *Twohig v. Shop-Rite Supermarkets, Inc.*, 519 F. Supp.3d 154 (S.D.N.Y. 2021); *Warren v. Coca-Cola Co.*, — F. Supp. 3d. —, 2023 WL 3055196 (S.D.N.Y. Apr. 21, 2023) (granting Rule 12 motions in all cases).

Plaintiff's claims here are similarly meritless, warranting prompt and summary dismissal. The Amended Complaint fails to satisfy the reasonable consumer standard because Plaintiff does not plausibly allege that: (1) citric acid used in Snapple Juice Drinks is not "natural," or (2) that any "reasonable consumer" would consider natural fruit and vegetable juice, used for coloring, unnatural.

1. The Amended Complaint does not plausibly allege that the citric acid in Snapple Fruit Drinks is not natural.

As courts have found in nearly identical circumstances, Plaintiff's general allegation that citric acid can be made using purportedly non-natural processes, Am. Compl. ¶¶ 26-28, is not enough to plausibly allege that the citric acid in Snapple Fruit Drinks is that form of citric acid. *See Tarzian v. Kraft Heinz Foods Co.*, 2019 WL 5064732, at *4 (N.D. Ill. Oct. 9, 2019); *Jackson v. SFC Global Supply Chain, Inc.*, 2021 WL 3772696 (S.D. Ill. Aug. 25, 2021). *Tarzian* is a case about citric acid in Capri Sun products labeled as containing "no artificial preservatives." *Id.* at *1. Plaintiffs alleged the claim was deceptive and misleading because the products contained citric acid, "a preservative alleged to be artificially produced on an industrial scale," that is synthetic in many food products. *Id.* Kraft moved to dismiss on the grounds that plaintiffs did not plausibly allege the citric acid in the Capri Sun products was unnatural, and the federal court granted the motion. *Id.* at *4. It reasoned that "[b]ecause Plaintiffs' allegations do not link the allegedly artificial citric acid to the actual citric acid used by Kraft, Plaintiffs have failed to allege sufficient facts showing that Kraft's 'no artificial preservatives' statement was false." *Id.*; *see also Jackson*, 2021 WL 3772696, at *2 ("merely asserting that [the ingredients] are highly processed does not

provide a plausible claim of artificiality.") (granting motion to dismiss); *accord Zaback v. Kellogg Sales Co.*, 2020 WL 6381987, at *4 (S.D. Cal. Oct. 2020) (dismissing complaint challenging nature of ingredient where insufficient factual specificity provided); *Figy v. Frito-Lay North America, Inc.*, 67 F.Supp.3d. 1075, 1090 (N.D. Cal. 2014) (dismissing complaint where Plaintiff "provide[d] no detail whatsoever about how or when the offending ingredients [were] unnatural").

The reasoning of these cases is on point. As in *Tarzian*, Plaintiff alleges generally that citric acid can be made "through numerous chemical reactions," and that it is "industrially produced." Am. Compl. ¶¶ 28-89. But Plaintiff does not connect general allegations regarding production of *some* citric acid with the citric acid used by Snapple or allege—anywhere—that the citric acid *in Snapple Fruit Drinks* is artificial or synthetic. And as the FDA definition for the ingredient establishes, it is indisputable that citric acid can be derived from natural sources and manufactured using natural processes. 21 C.F.R. § 184.1033(a). So, Plaintiff has "failed to allege sufficient facts showing that [the 'All Natural'] statement was false." 2019 WL 5064732, at *4; *see also Forsher v. The J.M. Smucker Co.*, 2020 WL 1531160, at *4–5 (N.D. Ohio Mar. 31, 2020) (granting motion to dismiss under federal Rule 8 when plaintiff alleged that some sugar beets are produced through genetic engineering but failed to connect that alleged practice to the sugar beets in defendant's products).

2. The Amended Complaint does not plausibly allege that natural fruit and vegetable juice is not natural.

It is equally implausible that any "reasonable consumer" would consider the Snapple Fruit Drinks to be non-natural, simply because they bear some coloring from what Plaintiff admits are vegetable and fruit juices that come from "natural sources." Am. Compl. ¶ 23. A "reasonable consumer" is presumed to have "common sense" when deciding what products to purchase and in reviewing product labels. *Warren*, 2023 WL 3055196, at *5 ("A reasonable consumer for purposes

of a GBL § 349 analysis does not lack common sense and is not assumed to be the least sophisticated consumer."). Moreover, when considering whether a label is deceptive it is the *entire* label that matters, including the ingredient list. *See, e.g.*, *Warren v. Whole Foods Mkt. Grp., Inc.*, 2021 WL 5759702, at *4 (E.D.N.Y. Dec. 3, 2021) (granting motion to dismiss where back panel clarified product's sugar content) ("[T]he fact remains that the words 'Sugar 11g' are prominently displayed immediately next to the ingredient list. Those words are hard to miss."); *Brown v. Kerry Inc.*, 2021 WL 5446007, at *6 (S.D.N.Y. Nov. 22, 2021), *report and recommendation adopted*, 2022 WL 669880 (S.D.N.Y. Mar. 7, 2022) (same); *Barreto v. Westbrae Nat., Inc.*, 518 F. Supp. 3d 795, 802 (S.D.N.Y. 2021) (same where ingredient list clarified product contained natural vanilla); *Sarr v. BEF Foods, Inc.*, 2020 WL 729883, at *5 (E.D.N.Y. Feb. 13, 2020) (same where ingredient list clarified that product also contained vegetable oils); *Reyes v. Crystal Farms Refrigerated Distribution Co.*, 2019 WL 3409883, at *3 (E.D.N.Y. July 26, 2019) (same). These principles of law readily dispose of Plaintiff's outlandish theory that natural fruit and vegetable juice is not natural, or that the Snapple Fruit Drinks' labels are somehow deceptive on that point.

It defies "common sense" to assert, without any accompanying factual basis, that a "reasonable consumer" considers admittedly natural fruit and vegetable juice unnatural. *Warren*, 2023 WL 3055196, at *5. The fact that the Plaintiff herself might consider natural fruit and vegetable juice non-natural is insufficient, under the law, to make this theory actionable. *Hughes v. Ester C Co.*, 330 F. Supp. 3d 862, 871 (E.D.N.Y. 2018) ("[I]t is not enough for a plaintiff to assert, based on his or her own subjective belief that a statement on the defendant's label conveyed the alleged implied message.").

And to the extent that the Plaintiff depends on the fact that these natural substances impart some color to the Snapple Fruit Drinks, the label affirmatively discloses this as it plainly states

that the ingredients are "For Color." Am. Compl. ¶ 22. This likewise discredits any plausible basis for claimed deception. *Barreto*, 518 F. Supp. 3d at 802; *Sarr*, 2020 WL 729883, at *5; *see also Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 501 (2d Cir. 2020) (finding that "there can be no section 349(a) claim when the allegedly deceptive practice was fully disclosed" in the advertisements (citation omitted); *Bowring v. Sapporo U.S.A., Inc.*, 234 F. Supp. 3d 386, 391 (E.D.N.Y. 2017) (finding that a reasonable consumer would not be misled where the alleged deceptions "are eclipsed by the accurate disclosure statement" on the packaging). And, for good measure, courts have held that the fact that a product is colored does not suggest to a "reasonable consumer" that any other ingredients are in the food in any particular proportion. *Akers v. Costco Wholesale Corp.*, 2022 WL 4585417, at *4 (S.D. Ill. Sept. 29, 2022); *Kennedy v. Mondelez Glob. LLC*, 2020 WL 4006197, at *9 (E.D.N.Y. July 10, 2020). The law thus resoundingly discredits the notion that natural fruit and vegetable juice used for coloring in Snapple Fruit Drinks makes the "All Natural" claim false or misleading in any fashion.

The only thing in the Amended Complaint that purports to prop up this implausible theory is the reference to decades-old informal non-binding FDA guidance that suggests foods labeled "natural" should not use coloring "regardless of source." Am. Compl. ¶ 14; *see also* 56 Fed. Reg. 60421, 60466. This allegation is, under the law, inadequate. Courts regularly hold that FDA regulations do not control the "reasonable consumer" analysis. In other words, "Plaintiffs' claims regarding FDA regulations are *not relevant* to determining whether a label is deceptive or misleading under GBL §§ 349–50." *Pichardo v. Only What You Need, Inc.*, 2020 WL 6323775, at *3, n.6 (S.D.N.Y. Oct. 27, 2020) (emphasis added); *accord Warren*, 2021 WL 5759702, at *3; *Steele v. Wegmans Food Markets, Inc.*, 2020 WL 3975461, at *1–2 (S.D.N.Y. July 14, 2020). That is because the FDA's views do not necessarily reflect those of a "reasonable consumer." *See N.*

Am. Olive Oil Ass'n v. Kangadis Food Inc., 962 F. Supp. 2d 514, 519 (S.D.N.Y. 2013) (concluding that a product's labeling did not mislead consumers where there was "no extrinsic evidence that the perceptions of ordinary consumers align with [FDA] labeling standards")).

Moreover, FDA guidance of the type at issue here is even *less* persuasive than the regulations courts routinely set aside in applying the "reasonable consumer" standard. FDA "guidance" or "informal policy" do not carry the "force of law." *In re Frito-Lay North Am., Inc. All Natural Litig*., 2013 WL 4647512, at *10; *Podpeskar v. Dannon Co., Inc*., 2017 WL 6001845, at *3–4 (S.D.N.Y. Dec. 3, 2017) (noting FDA policy was "informal" and declining to include FDA interpretation as part of reasonable consumer analysis). That is because FDA guidance lacks the "formal deliberative process" contemplated by the Supreme Court and required to carry the "force of law." *Holk v. Snapple Beverage Corp*., 575 F.3d 329, 342 (3d Cir. 2009).[1] So, Plaintiff's reliance on the FDA's informal statements is irrelevant as to whether a reasonable consumer would be deceived by the Snapple Fruit Drinks' "All Natural" statement, particularly considered with the language on the rest of the label. For these reasons, Plaintiff's GBL claims fail.

C. Plaintiff's Unjust Enrichment Claim Fails With the GBL Claims.

Plaintiff's unjust enrichment claim is based on the exact same theory of deception as her GBL claims. *See* Am Compl. ¶ 99. It is well-settled that when an unjust enrichment claim merely parrots the complaint's other theories of liability, the claim is duplicative and must fail along with the GBL claim. *See Warren v. Stop & Shop Supermarket, LLC*, 582 F.Supp.3d 268, 287-88 (S.D.N.Y. 2022) (unjust enrichment claim fails where "[i]t 'relies on the same factual allegations

[1] Courts have so held for other agencies' informal statements and policies. *See Carias v. Monsanto Co*., 2016 WL 6803780, at *6 (E.D.N.Y. Sept. 30, 2016) ("Defendant has not shown that an EPA 'Fact Sheet,' discussing EPA's classification of glyphosate, or an EPA 'Desk Statement' have the force of law").

and the same theory of liability' as Plaintiff's other theories of recovery") (internal citation omitted) (collecting cases).

Here, the unjust enrichment claim is, word for word, identical to the allegation the court in *Warren* deemed duplicative of the plaintiff's GBL claim. *Compare* Am. Compl. ¶ 56 ("Defendant obtained benefits and monies because the Products were not as represented and expected, to the detriment and impoverishment of Plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits.") *with Warren*, 582 F.Supp.3d at 287 ("Defendant obtained benefits and monies because the Product[ ] [was] not as represented and expected, to the detriment and impoverishment of Plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits.") (quoting complaint).[2] So, just as in *Warren*, the unjust enrichment claim here must be dismissed.

IV. CONCLUSION

For the foregoing reasons, Snapple respectfully requests this Court dismiss Plaintiff's Amended Complaint with prejudice. As the Court noted at the Pre-Motion Conference, Plaintiff has already amended her complaint once and declined an opportunity for further amendment. So, dismissal with prejudice is now the compelled outcome.

DATED: September 29, 2023

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[2] The identical nature of the pleadings in this case as compared with *Warren* is not coincidence. Plaintiff's counsel here was counsel in *Warren*, and the duplicative language reflects the boilerplate nature of counsel's labeling lawsuits.

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